United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1005
26 July 2001

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1005

Case No. 1095: LORGE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha A. Echols; Ms. Brigitte Stern;

Whereas, on 18 and 25 May 1999, Jean-Marie Lorgé, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an application that did not fulfil all the formal requirements stipulated in article 7 of the Rules of the Tribunal,

Whereas, on 19 August 1999, the Applicant, after making the necessary corrections, again filed an Application, containing pleas which read as follows:

"**Pleas**

[...]

2. *Contested decisions whose rescission I have requested*:

2.1 I request that the decisions of UNDP headquarters to prematurely terminate my assignment in Armenia be declared arbitrary, unjustified, seriously damaging to my honour and my professional reputation, and taken in clear violation of

basic administrative rules (United Nations and UNDP) ...

2.2 I request that the decision of UNDP headquarters to prematurely end my career with UNDP be rescinded ...

2.3 I request that my request for early retirement of 30 August 1996 ... and my letter of no contest of 30 August 1996 be considered null and void ...

3. *Obligation whose performance I am requesting*

3.1 I request UNDP headquarters to clearly recognize the implicit promise of a full career (i.e., until normal retirement age in UNDP ...).

3.2 I ask to be immediately reinstated pursuant to chapter IV ... of the United Nations Staff Rules ...

3.3 I request UNDP headquarters to immediately offer me the option of choosing a post among all vacant posts or posts expected to be vacated in the short term that are commensurate with my grade level and experience, as recognized by headquarters ...

4. *Amount of compensation claimed*

4.1 I ask that all the sums which I might be requested to repay owing to the decision to reinstate me (see item ... 3.2 above) be regarded as the minimum compensation payable by UNDP headquarters as reparation for the injury which I have sustained.

4.2 In addition to the minimum amount referred to in item ... 4.1 above, I request that compensation equal to two years' salary be paid to me by UNDP as reparation for the moral suffering which I have endured since 1994 ...

4.3 In the event that no action is taken on my requests ... I ask that compensation equal to five years' salary be paid to me ...

5. *Other requests*

5.1 I request the Tribunal ... to order the imposition of appropriate penalties ... against the staff members who involved UNDP in these nefarious and idle proceedings.

5.2 I ask the Tribunal to order an internal audit of UNDP personnel management since 1994 ...

5.3 I request this internal audit mission to propose such remedies as it deems appropriate in order to put an end to the dysfunctional characteristics disclosed ..."

Whereas the Respondent filed its Answer on 12 October 2000;

Whereas the Applicant filed Written Observations on 22 January 2001;

Whereas the Applicant filed additional documents on 21 and 28 May 2001, on which the Respondent produced comments on 18 June 2001;

Whereas the Tribunal put a question to the Respondent on 5 July 2001, to which the latter replied on the same date;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP in 1971 in Bangui, Central African Republic, on a fixed-term contract. After being assigned to various UNDP offices at the P-2 and P-3 levels, he received a permanent contract on 1 July 1979 and was promoted to P-4 on 1 January 1980. On 1 January 1985, he was promoted to P-5. On 29 December 1990, he was assigned to Moroni, Comoros, as Resident Representative and was promoted to D-1 on 1 January 1992. On 11 August 1995, he was assigned to Yerevan, Armenia, as Resident Representative, where he remained until 30 September 1996.

On 28 March 1996, the Assistant Administrator and Regional Director of the UNDP Regional Bureau for Europe and the Commonwealth of Independent States (RBEC) sent a letter to the Applicant, informing him that "the requests for support letters made by the UNDP Resident Representative in Yerevan [the Applicant] to the Government has created a feeling of discomfort" and that "weaknesses [had been] identified in your performance as Manager of the UNDP Office, as UN Resident Coordinator, and as our man-on-the-spot to develop a UNDP programme". He also noted with concern that no decisive action seemed to have been taken to redress those anomalies and concluded that, in spite of the Applicant's efforts, "the office requires a different UNDP Head of the Office". In his reply dated 10 April 1996, the Applicant refuted these accusations and stated that, under his management, the Office was demonstrating "robust signs of dynamism and efficiency, in contrast to the past". He also stated that "the office profile has entirely changed ... in the right

direction" and that he had "no alternative but to request an audit mission".

On 19 April 1996, the Assistant Administrator and Regional Director, RBEC, wrote to the Applicant, requesting that he leave his duty station early because there was "a difference in perception on what the office profile of UNDP in Armenia should be". On 23 April 1996, the Applicant sent an e-mail to the UNDP Administrator stating that, in view of the situation, a reasonable alternative would be for him to take an early separation package (ESP), as it would be impossible for him to properly carry out his duties as Resident Representative without the support of RBEC.

On 6 May 1996, the Applicant reiterated his request for an audit; he renewed it again on 16 May and on 24 June.

On 28 June 1996, the Applicant requested the Joint Appeals Board (JAB) to suspend the administrative decision to relieve him of his duties as Resident Representative. He also filed a formal statement of appeal against that decision in the event his request for suspension should be denied.

On 10 July 1996, the Applicant made a final request for an audit.

On 17 July 1996, the UNDP Administrator confirmed that the Applicant's assignment would be officially terminated at the end of September 1996. On 31 July 1996 the Director of the UNDP Office of Human Resources confirmed in writing the conditions of the Applicant's agreed separation. The relevant portions of the letter read as follows:

> "You are entitled to a separation indemnity of 21 months (12 months basic plus 6 months additional indemnity plus 3 months in lieu of notice). To bridge you into early retirement in September 1998, the following arrangement will apply:
>
> You will leave ... Armenia effective 30 September 1996 c.o.b. From 1 October through 31 December 1996 you will be on annual leave for three months, to proceed on Special Leave with Full Pay (SLWFP) for the duration of your separation indemnity, i.e. 21 months, from 1 January 1997 through 30 September 1998 c.o.b. when you will officially separate from the Organization ...
>
> ...
>
> Kindly sign the attached letter of no contest ..."

On 19 August 1996, the Applicant again appealed before the JAB the decision taken by UNDP to end his career. He requested the Board to take action on his request of 29 May 1996 or, failing that, on his request of 28 June 1996.

On 30 August 1996, the Applicant signed an early separation agreement in which he accepted the conditions spelled out in the letter dated 31 July from the UNDP Administrator, attaching thereto a letter of no contest, and he submitted a letter of resignation effective 30 September 1998. The following day, on 31 August, the Applicant wrote to the Director of the Office of Human Resources, commenting on his letter of no contest.

On 5 September 1996, the Applicant addressed copies of the early separation agreement and the letter of no contest to the JAB.

On 21 November and 30 December 1996 and on 12 February 1997, the Applicant requested that the audit report on the Yerevan Office be finalized and transmitted to him. On 29 March 1997, the Director of the Office of Human Resources informed the Applicant that the audit report would be issued shortly and that he would receive a copy. On 14 April 1997, the Applicant reiterated his request. On 29 May 1997, he requested the UNDP Administrator to transmit the audit report to him and also to rescind the decision concerning his early retirement. He also requested that his agreement and his signature of the letter of no contest be considered as vitiated by the Administration's abuse of power and undue influence. On 2 June 1997, the Applicant was again informed of the forthcoming issuance of the audit report.

The JAB adopted its report on 9 March 1999. Its considerations, conclusions and recommendations read as follows:

"**Considerations**

21. The Panel first determined that the appeal raised one main issue, namely whether the Appellant's agreement to avail himself of an early separation package was vitiated by the Respondent's undue influence or any other administrative irregularity.

...

23. The Panel ... observed that the Appellant had to adduce convincing evidence tending to prove his allegation that the Respondent coerced his will to take an ESP. The Panel was

of the view that the facts, as presented by both parties, did not disclose any unlawful pressure exercised by the Respondent, in order to induce the Appellant to take an ESP. The Panel noted that on 23 April 1996, the Appellant sent a memorandum to the UNDP Administrator, in which he stated that since it would be impossible for the Appellant to properly carry out his functions as Resident Representative of the Armenia Office, a `reasonable alternative would be for him to take an ESP' ... According to the Panel, this statement constituted an indication that the Appellant himself was considering the ESP as a possible solution to his disagreements with the UNDP Administration. It was of the view that the Respondent was forthcoming in informing the Appellant about the conditions and modalities of the ESP, and that the Appellant unreservedly assented to the terms of the ESP agreement.

Conclusions and Recommendations

24. The Panel could not find any proof or indication suggesting that the Appellant was forced or otherwise unduly induced to sign the ESP agreement. It concluded that the Appellant's rights to due process were duly observed by the Respondent and that there was no violation of his terms of appointment.

25. ... the Panel *unanimously agreed* to make no recommendation in support of the present appeal."

On 8 June 1999, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

The Secretary-General ... has taken note that the Panel could not find any proof or indication suggesting that you were forced or otherwise unduly induced to sign the Early Separation Package in question. He has also taken note of the Panel's conclusion that your rights to due process were duly observed by UNDP and that there was no violation of your terms of appointment. He has further noted that the Panel unanimously agreed to make no recommendation in support of your appeal. Accordingly, the Secretary-General has decided to take no further action on your appeal.

..."

On 19 June 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. His signature of an agreement not to contest the modalities of the proposed settlement and his acceptance of an early separation package were vitiated by the Administration's abuse of power and its undue influence.

2. The Administration violated his due process rights and improperly ended his career after having slandered and humiliated him.

Whereas the Respondent's principal contention is:

The Applicant has not adduced any evidence to prove that he was forced or unduly induced to sign the early separation package.

The Tribunal, having deliberated from 27 June to 26 July 2001, now pronounces the following judgement:

I. The Tribunal wishes to explain at the outset that on 28 June 1996 the Applicant filed an initial application with the Secretary of the JAB in New York, making a twofold request: a request for suspension of the Administrator's decision to terminate his employment and, in the event that such request was denied, a formal appeal against that decision. Then, after having accepted the early retirement package on 30 August 1996, he addressed a new request to the Administrator on 29 May 1997, asking the latter to:

A. Rescind his decision of 17 July 1996 requesting the Applicant to take early retirement;

B. Consider the decisions taken by the Applicant on 30 August 1996 as vitiated by the Administration's moral violence and abuse of power;

C. Waive the time-barring of the appeal because of the failure to issue the audit report on the Applicant's management in Armenia.

On 19 August 1997, the Applicant submitted a new appeal to the JAB against the Administrator's decision to end his career with UNDP.

Although it was not within the time limits, the Applicant requested the JAB to take a decision on his request of 29 May 1996 and, failing that, on his request of 28 June 1996.

The Board's report was issued on 9 March 1999. In its report, the Board did not focus on the issue of the inadmissibility of the appeal. It stated unanimously that with regard to the central and substantial issue of abuse of power and lack of due process, the Applicant had not adduced convincing proof, and it therefore rejected the appeal.

II. With regard to the question of the Applicant's acceptance of the early retirement package having been vitiated, the Tribunal confirms the conclusions of the JAB.

The Tribunal notes, first of all, that it has consistently held that United Nations staff members who accept the benefits of agreed terminations, whether they involve early retirement or another type of arrangement, cannot accept them as settlements and at the same time institute proceedings against the United Nations (see Judgements No. 547, *McFadden* (1992), and No. 573, *Bhatia* (1992)). This case-law is obviously contingent upon the departure having been agreed to voluntarily.

The Tribunal is of course aware that the Applicant was extremely divided over what solution to adopt during the summer of 1996, but this fact alone cannot invalidate the conclusion he arrived at, which makes his retirement a freely accepted decision. While the Applicant hesitated over what choice to make, the numerous discussions which he had with the Administration culminated in the early retirement package, with its various related benefits, and in the Administration's agreement to the Applicant remaining in his post until 30 September 1996. A letter of 31 July 1996 set forth in great detail all the benefits for which the Applicant would be eligible following this agreed separation: coverage under the UNDP special programme for early retirements, provided that he accepted before 31 August 1996 (that deadline represented a favour to the Applicant, since the cut-off date for coverage under the programme was normally 30 June 1996); 21 months' paid leave at the Brussels post adjustment level, which was a substantial benefit; and an education grant for his daughter until 1 January 1999.

This agreement was endorsed by the Applicant in two letters of 30 August 1996, the first being the one in which he tendered his resignation effective 30 September 1998, following special

leave with full pay, and the second being the letter of no contest, in which he indicated that he would not contest the terms of the agreement worked out with the UNDP Administration: "This agreement constitutes the final and complete settlement of all or any claims that could have arisen from my employment and its termination prior to this date". In so doing he renounced all earlier claims. The no-contest agreement was obviously given on the condition that the termination indemnities provided for in the letter of 31 July 1996 were actually paid to him; no other reservation was stated.

Nevertheless, on the following day, 31 August 1996, the Applicant put forward a reservation to his letter of no contest, which reads as follows:

> "It is quite clear that the letter of no contest represents an undertaking that cannot be separated from Headquarters conducting itself towards me in a manner consistent with the provisions of the United Nations Staff Rules, starting on 31 July 1996."

That the Applicant sent conflicting signals at different stages of the negotiations over his departure is not in doubt; that he had difficulty adjusting to his early retirement is also clear from a number of documents: for example, in a letter to the UNDP Administrator dated 23 April 1996, he indicates that he wishes to "stress the fact that this prospect of an early retirement weighs all the more heavily on me since I had the firm intention of remaining active within the United Nations system until normal retirement age". Unquestionably, this whole period was a difficult stage in his life; he even mentions that the criticisms addressed to him in May 1996 came a few days after the death of his mother.

The Tribunal wishes to state, however, that there is no evidence on record suggesting that the Applicant did not freely choose his early retirement after having considered all the circumstances and all the facts of the matter. The Tribunal arrives at this conclusion, first, because the Applicant allowed the agreed indemnities to be paid to him without raising the slightest objection and, second, because the Applicant, a jurist by training, signed the two letters of 30 August 1996 knowing full well what was involved. The Tribunal considers that, pursuant to the Staff Rules and to universally accepted principles of law, the consent and signature of an adult person having legal capacity constitutes an undertaking and a future binding obligation, unless there is convincing proof of misrepresentation or fraud on the part of the co-contracting party. Lastly, the Tribunal believes that

the Applicant is wrong in seeking to link the question of the audit to that of his separation from service, for nowhere, either before or during the signing of the agreement of 30 August 1996, did the Applicant make any mention of a condition requiring UNDP to provide him with a report in order for the agreement to be finalized. There is no proof that the Applicant's consent, even if it was not easy for him to give it, was vitiated.

Accordingly, the Tribunal considers that it has not been proven that there was an abuse of power by the Respondent or that the Applicant's rights to due process were violated at the time of his separation from service.

III. The Tribunal now turns to the question of the lack of due process resulting from the failure to transmit the audit report following his departure, considered in and of itself, irrespective of any link with a challenge to the early separation agreement.

Up to 30 September 1998, the Applicant was a UNDP staff member on SLWFP; all of the Administration's obligations towards its staff therefore apply to him.

It is certain that irrespective of the early retirement issue, which the Applicant seeks to link unduly to the issue of the report in order to raise questions about the past, the issue of the failure to transmit that report does arise.

In order to answer the legal questions raised by the application concerning the failure to transmit the report, the Tribunal wishes to state clearly that an employee has no right to obtain an audit of his management. That is a question left to the discretionary judgement of the Administration.

On the other hand, the Tribunal believes that once the Administration agreed to carry out an audit at the request of one of its staff members, there was no justification for refusing to transmit the results of that audit. The Administration's obligations of transparency and due process vis-à-vis its employees imply that such an audit should be transmitted to the principal concerned, especially since in the present case, the Applicant had stated emphatically on numerous occasions that the transmittal of the report held great significance for him.

It is certain that the request for an audit made by the Applicant in his memorandum of 10 April 1996 was presented on several occasions: for example, in a letter of 10 June 1996 to the UNDP Administrator, he mentions expressly that "my request for an audit is of crucial importance to me";

likewise, in a letter of 16 May 1996 and a fax of 24 June 1996, he renewed a request for an audit made on 6 June 1996; lastly, in a letter of 10 July 1996 to the Director of the Office of Human Resources, the Applicant indicates that before tendering his resignation, he is determined to dispel any suspicions that might cloud his reputation, and he reiterates his request for an audit.

The audit mission seems to have been carried out in September 1996. On numerous occasions thereafter, the Applicant asked for the audit report prepared during this mission, to no avail.

Moreover, the Administration nurtured the Applicant's belief that such an audit report existed and that it was to be transmitted to him at any moment. The reply given to the Applicant's various missives, particularly in a letter of 19 March 1997, was that the report had not yet been finalized. The Tribunal notes that the Administration never refused to transmit the report, nor did it inform the Applicant that there was no report; it simply indicated to him each time it was asked that it needed additional time to finalize the report and transmit it to him. This situation persisted for five years. The Administration therefore gave the Applicant the impression that the proper thing for him to do was to wait for the report to be transmitted. The Tribunal notes, for example, that in the aforesaid letter of 19 March 1997, the Director of the Office of Human Resources stated, in reply to one of the Applicant's multiple requests, that the report was about to be finalized: "DAMR [the Division for Audit and Management Review] expects to issue the report in the near future, and a copy will be sent to you promptly".

The Tribunal, however, sought to determine what had happened to this report, and was told by the Director of DAMR, in a letter of 5 July 2001, that no such report existed.

The Tribunal does not consider it necessary to embark on a more thorough investigation into whether or not this report exists. It is compelled to note, however, that the Applicant's good faith was abused. For several years he was led to believe that the report would be transmitted to him.

There are three possibilities: (1) there never was a report; if so, it is incomprehensible that the Administration would deliberately have misled the Applicant by promising to deliver it to him; (2) the report exists; if so, the Tribunal likewise fails to understand why the Administration would have withheld such a report; (3) the report existed and was destroyed; here too, the Tribunal believes that such an act would be contrary to the principles of good governance. Whichever hypothesis is selected, the Tribunal considers that the Administration did not deal with its employee in accordance

with the procedures that can in good faith be expected of the Organization, and that this has resulted in unquestionable injury to the Applicant.

IV. For the foregoing reasons, the Tribunal decides that:

- The Applicant is entitled to $7,000 as compensation for the injury resulting from the failure to transmit the audit report which the Administration continually promised to send him for several years;

- All other claims are rejected.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha A. ECHOLS
Member

Brigitte STERN
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary